BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DONALD LEO KINDEL (DECEASED) Claimant VS.	)	
	)	Docket No. 173,368
FERCO RENTAL, INC. Respondent AND	)	
WAUSAU INSURANCE COMPANIES Insurance Carrier	)	

ORDER

ON March 15, 1994 claimant's application for review of the January 14, 1994 award by Administrative Law Judge George R. Robertson came on for oral argument.

APPEARANCES

Claimant appeared by and through his attorney, James D. Sweet of Salina, Kansas. The respondent appeared by and through its attorney, John W. Mize of Salina, Kansas. There were no other appearances.

RECORD

The record considered on appeal is the same as that listed in the award of the administrative law judge.

STIPULATIONS

The Appeals Board hereby adopts the stipulations listed in the award of the administrative law judge.

ISSUES

The issues to be considered in this appeal are:

(1) Whether the accidental death of Donald Leo Kindel arose out and in the course of his employment; and

(2) Whether the death of Donald L. Kindel resulted substantially from his intoxication.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After review of the record and consideration of the arguments by counsel, the Appeals Board finds:

(1) The accidental death of Donald L. Kindel did arise out of and in the course of his employment for respondent.

Claimant was killed on October 11, 1991 at approximately 7:50 p.m. in a one car accident west of Topeka on Interstate 70. Claimant and his supervisor had driven that morning from Salina to a construction job site in Sabetha. They performed certain job duties at that job site and were returning home at the time of the accident. The dispute of this case comes from the fact that, although claimant and his supervisor were on the route home at the time of the accident, they had spent approximately four hours at a bar drinking before they returned to that route. From these facts the administrative law judge found claimant's detour from employment was so substantial as to amount to an abandonment of the employment. The administrative law judge therefore denied benefits, finding that the accidental death did not arise out of claimant's employment.

The Appeals Board reverses the ruling of the Administrative Law Judge. In so doing the Appeals Board acknowledges that there is case law from other jurisdictions supporting the Administrative Law Judge's decision. See Calloway v. State Workmen's Compensation Commission, 268 S.E. 2d 132 (W. Va. 1980). There is, however, also case law supporting a finding of compensability. See Rainear v. C.J. Rainear Co. Inc., 63 N.J. 276, 307 A.2d 72 (1973). For reasons given below, the Appeals Board finds the latter to be more persuasive.

To be compensable the death must arise out of and in course of claimant's employment. The phrases arising "out of" and "in the course of employment" have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowed. Hormann v. New Hampshire Insurance Company, 236 Kan. 190, 689 P.2d 837 (1984). The phrase arising out of employment points to cause or origin of accident and requires some causal connection between accidental injury and employment. The phrase "in the course of employment" relates to the time, place and circumstances and means the injury happened while the employee was at work in his employer's service. Angleton v. Starkan, Inc., 250 Kan. 711, 828 P.2d 933 (1992).

In this case claimant had been working with a construction crew at the Sabetha High School. During the project, the crew would travel to Sabetha, spend the week there and return to Salina on weekends. Claimant would travel to and from Sabetha in a company vehicle. As a condition of his employment, claimant and other members of the crew were expected to live out of town during the work weeks.

On the day of the accident, claimant's supervisor picked him up at claimant's residence in Salina at approximately 7:00 a.m. The two drove to Sabetha where the claimant worked while his supervisor attended meetings with other contractors. Claimant's supervisor, James Graham, testified that he and claimant left Sabetha in the afternoon and started back to Salina. Graham drove and took the most direct route to Salina through Topeka to Interstate 70. Graham and the decedent stopped, however, at the Outer Limits Club, located along I-70 west of Topeka.

Graham testified that he suffers from amnesia. He cannot recall any of the events occurring after they stopped at the Outer Limits Club. It is undisputed, however, that claimant was thereafter killed in a one vehicle automobile accident going west on I-70 from Topeka to Salina. It is also not disputed that at the time of accident that claimant was a passenger in the vehicle driven by his supervisor, James Graham. Tests done by the investigating officer show both claimant and James Graham had blood alcohol levels substantially in excess of the legal presumption of intoxication. The investigating Highway Patrol officer testified that in his opinion the alcohol level of the driver was a substantial cause of the accident.

Injuries occurring while traveling to and from employment are generally not compensable. See K.S.A. 44-580(f). An exception applies when the travel is an integral part of or necessary to the employment. Blair v. Shaw, 171 Kan. 524, 233 P.2d 731 (1951); Messenger v. Sage Drilling Company, 9 Kan. App. 435, rev. denied 235 Kan. 1042, 680 P.2d 556 (1984). Travel to a remote site and travel paid for or provided by the employer generally bring travel within the exception and make injuries in the course of that travel compensable. Messenger v Sage Drilling Company, 9 Kan. App. 2d 435, 680 P.2d 556 (1984); Larson's Workmen's Compensation Law, Section 16.31. In this case the travel was to a remote site in a company vehicle driven by the claimant's supervisor. The Appeals Board therefore finds that claimant's trip to and from Sabetha would, absent the detour, have been considered a part of claimant's employment.

The more difficult question is whether the detour to the Outer Limits Club requires a different result. In general a personal deviation from a business trip takes the employee out of the course of his employment at least until he returns to the route of the business trip. Injuries which occur in the course of that deviation are not compensable. Woodring v. United Sash & Door Company, 152 Kan. 413, 103 P.2d 837 (1940). On the other hand injuries which occur once the employee has returned to the route of business trip are generally compensable. See Larson's Workmen's Compensation Law, Sec. 19.30 and 19.31. The decision by the administrative law judge recognizes both of these general principles but bases the holding on a third principle. Citing case law from other jurisdictions the administrative law judge finds that the deviation was so substantial as to amount to abandonment of the employment such that the return to the route did not constitute a return to employment.

The Appeals Board notes parenthetically that several of the decision cited in the Award are distinguishable from the present circumstances. Those cases involve a

substantial deviation from employment without evidence or finding that the claimant has returned to otherwise covered activity at the time of the accident. See Inter-Insurance Exch. v. Bevel, 663 S.W. 2d 242 (Mo. 1984); Indiana & Michigan Electric Company v. Morgan, 494 N.E. 2d 991 (Ind. Ct. App. 1986); O'Connell v. State Acc. Ins. Fund, 19 Or.App. 735, 529 P.2d 1064 (1974). Those decisions may, therefore, be understood to be ones which determine when the deviation is enough of a deviation that claimant is not considered to be in the course of his employment when the accident occurs during the deviation.

The one Kansas case cited, Woodring v. United Sash & Door Company, Supra is also factually distinguishable. In that case claimant had traveled to another town to perform an errand for his employer. Instead of performing that errand, he met friends and with those friends went dancing. He did not perform the errand intended as the purpose for the trip. He was then injured upon his return. In that case claimant logically can be said to have abandoned his employment.

In Bush v. Parmenter, Forsythe,Rude & Dethmers, 413 Mich. 444, 320 N.W. 2d 858 (1982), also cited by the Administrative Law Judge, the court takes a still slightly different approach. In that case claimant was injured on the trip home after attending a seminar. Claimant had stopped on the way home, visited several bars, and ate his meal at an all night restaurant. He left the restaurant for his home at approximately 3:00 a.m. and was fatally wounded by a gun shot at 3:12 a.m. The court first states that as a general rule neither length, nature or duration of the deviation is material so long as the employee has returned to the path leading to his destination. The Court cites as an exception to this rule circumstances where the deviation increases the exposure to risk or likelihood of injury. On the basis of that exception, the Court denied benefits.

The Appeals Board rejects the Bush rationale. It is true that the phrase "arising out of" relates to cause or origin of the accident. Accidents arising from purely personal risks may not be compensable. Martin v. Unified School District #233, 5 Kan. App. 298, 615 P.2d 168 (1980). It appears, however, the risks must be solely a personal one and injuries arising from both personal and work related risks are compensable. Bennett v. Wichita Fence Company, 16 Kan. App. 2d 458, 824 P.2d, 1001 (1992). Even if we assume in this case the deviation from employment increased the risk, the injury and death resulted from the combined personal and work related risks. Under Kansas law the increased risk factor should not, by itself, bar recovery.

As previously acknowledged, there is case law from other jurisdictions which directly supports the decision by the administrative law judge in this case. See Calloway v. State Workmen's Compensation Commission, supra. In the Callaway case the claimant and a fellow employee went tavern-hopping after several business related calls. The court found that the deviation from employment was so substantial that it amounted to abandonment of employment and return to the route of the business trip did not return him to the scope of his employment. The subsequent injury was not, therefore, considered to arise out of and in the course of his employment.

There are also cases from other jurisdictions which find the injury to be compensable under circumstances similar to those in the present case. See Rainear v. C.J. Rainear Co.Inc., 63 N.J. 276, 307 A.2d 72 (1973); Adams v. United States Fidelity &

Guaranty Company, 186 S.E. 2d 784 (Ga. Ct. App. 1971); Rainbow Bread Company v. Claimants of Smith, 519 P.2d 1208 (Colo. Ct. App. 1974). In Rainear, for example, claimant was injured in an automobile accident which occurred on the route home after a ten hour deviation from employment which included dinner and drinking. There was no dispute that claimant's travel should be treated as part of his employment because the employer paid the travel expenses.The New Jersey Appellate division nevertheless denied benefits, following a rationale similar to that followed by the administrative law judge in the present case. The New Jersey Supreme Court reversed. In explaining the decision to reverse, the Court stated: (1) claimant had not gone to some remote area evidencing an intent to completely abandon his trip home; (2) there is nothing in the law which fixes an arbitrary limit to the number of hours for deviation from employment which resumes once the travel resumes; (3) the fact that he did some drinking may have influenced the lower court but in reality has no legal bearing since there was no proof the death resulted from intoxication.

The Appeals Board considers the rationale followed in the Rainear decision to be more consistent with the purpose and intent of the Kansas workers compensation act. The Act is to be liberally construed to bring both employees and employers within the coverage of the act. K.S.A. 44-501(g). The fact that claimant had been drinking and even the type of bar may be emotionally charged factors. This is especially so in this case where respondent had a clear policy against drinking while driving company vehicles. Nevertheless, the activities of claimant during the deviation from employment do not have any real relevance to whether the accident which occurred after claimant returned to the route home in the company vehicle occurred in the course of employment. Had claimant and his supervisor stopped for the evening, spent the night at a motel and returned the next morning, an accident on the route home would likely have been considered compensable. The only difference here is the nature of the activity during the deviation from employment.

The Appeals Board does not consider the nature of the activity, i.e., the drinking at a topless bar, to be determinative. The Kansas worker's compensation act is generally a no fault system. With the exception of certain specific defenses, e.g., refusal to use a safety guard or injury caused by the claimant's intoxication, the fault of the claimant is not relevant to compensability. Second, the specific factor, i.e., drinking, is already addressed by statute. See, K.S.A. 44-501(d). The statute specifies the circumstances where intoxication acts to bar recovery. It would be inappropriate expansion of that statute if claimant's drinking were the sole factor taking the injury out of the scope of employment.

When reduced to the essential relevant facts, this case is not materially different from any other where a claimant deviates from his employment but has returned at the time of the accident. The Appeals Board therefore finds that claimant's death arose out of and in the course of his employment.

(2) The death of Donald Leo Kindel did not result substantially from his intoxication.

K.S.A. 44-501(d) provides in pertinent part;

> If it is proved that injury to the employee results..... substantially from the employees intoxication, any compensation in respect to that injury shall be disallowed.

In this case the only credible evidence, that provided through testimony of the investigating police officer, indicates claimant supervisor, not claimant, was driving at the time of the accident. Our statute expressly refers to intoxication of the claimant as the cause, not simply intoxication generally. See Allison v Brown & Horsch Insulation Co., 102 A 2d. 493 (N.H. 1953). It would require speculation beyond the reasonable inferences from the evidence in this case to conclude claimant's own intoxication was a substantial cause of the accident.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the award of the Administrative Law Judge dated June 14, 1994 is reversed and the action remanded for decision regarding the amount of benefits due and determination of appropriate recipients of those benefits.

IT IS SO ORDERED.

Dated this ____ day of August, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Dan Boyer, Attorney at Law, PO Box 813, Salina, KS 67402-0813
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